Chicago and Northeast Illinois District Council of Carpenters *and* Prime Scaffold, Inc., and Construction and General Laborers' District Council of Chicago and Vicinity, affiliated with the Laborers' International Union of North America, AFL–CIO. Case 13–CD–653

April 30, 2003

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

This is a work jurisdiction proceeding under Section 10(k) of the National Labor Relations Act. A charge was filed on August 6, 2002,[1] and an amended charge was filed on August 19, by Prime Scaffold, Inc. (Prime or the Employer). The charge alleges that about June 3 and thereafter, the Respondent, Chicago and Northeast Illinois District Council of Carpenters (Carpenters), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to individuals the Carpenters represent rather than to employees represented by the Construction and General Laborers' District Council of Chicago and Vicinity, affiliated with the Laborers' International Union of North America, AFL–CIO (Laborers). The hearing was held on August 27 and 28 before Hearing Officer Hyeyoung Bang-Thompson.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties have stipulated that the Employer is an Illinois corporation engaged in the business of erecting, dismantling, and renting scaffolding. Within the 12 months preceding the hearing, which is a representative period, the Employer has received goods in excess of $50,000 from outside the State of Illinois at its facility located in Bensenville, Illinois, and has performed services outside the State of Illinois valued in excess of $50,000. The parties have stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find, based on the stipulation of the parties, that the Carpenters and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

[1] All dates are in 2002 unless otherwise noted.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer has erected and dismantled platforms and scaffolding for construction sites in several Illinois counties, including the Chicago area, since the mid-1980s. In projects in the Chicago area, it has used employees represented by the Laborers. In projects outside the Chicago area, it has also used employees represented by the Laborers, unless a general contractor or contractor has required that it use individuals represented by the Carpenters.

On the SkyBridge project at issue, each contractor hired its own subcontractors. Prime performed the scaffolding work on the SkyBridge project pursuant to a subcontract with Levy Company. The general contractor on the entire project was Walsh Construction.

Prime began work on the project on June 3. Its crew consisted of Mark Malczewski, who was a field foreman for Prime represented by the Laborers, and two other Laborers-represented employees.

On June 3, Malczewski was approached by Gary Meredith, who identified himself as a Carpenters' steward. Meredith worked for Walsh Construction, and he was the Carpenters' chief steward on the SkyBridge project. Meredith asked Malczewski if the scaffolding employees were carpenters or laborers. Malczewski responded that they were laborers. Meredith informed Malczewski that usually a mixed crew of carpenters and laborers erected the scaffolding. Meredith then left, returned a short while later, and stated to Malczewski that the Carpenters' business agent (Tom Ryan) said that the scaffolding employees had to stop working.[2] Malczewski responded that he would call Prime's superintendent.

During the 10 minutes it took Malczewski to call the superintendent, the other two Laborers-represented employees also stopped working. On Malczewski's return, he informed Meredith that Prime's superintendent said that the laborers should continue working unless a Laborers' business agent told them to stop. Meredith responded that that was fine, that he understood, and that he would talk to the Carpenters' business agent.[3]

[2] Ryan admitted that on the SkyBridge project, Meredith worked for Walsh Construction, was the chief steward for the Carpenters, reported violations of the Carpenters' jurisdiction to Ryan, enforced the collective-bargaining agreements between the Carpenters and the contractors, monitored safety, and was "an agent of the business agent" "while [Meredith was] on the job."

[3] Malczewski testified that later that day he asked Meredith whether anything would come of the situation. In response, Meredith stated, "There's a possibility [Carpenters] might picket the job." No further conversations were held between Meredith and Malczewski.

Later on June 3, a Levy company representative told a vice president for Prime, Joe Nitty, that there was a problem with the Carpenters claiming the scaffolding work. Nitty responded that Prime has been having this problem with the Carpenters for quite a while and that he would try to take care of it. Nitty then called the business agent of the Carpenters, Ryan. According to Nitty, Ryan said that the Laborers-represented employees were doing the work of Carpenters-represented individuals.[4] Nitty responded that Prime considered the work to be correctly assigned to employees represented by the Laborers. Ryan replied that he wanted to put a steward on the job, pursuant to a collective-bargaining agreement between Prime and the Carpenters.[5] Nitty replied, "You can put a steward on if you want, but I'm not paying him." Nitty offered to arrange a meeting between the Carpenters and the Laborers, but Ryan refused.

Shortly after June 3, the Carpenters filed a grievance with Prime alleging that it was required to place a Carpenters' steward on the SkyBridge project. At the time of the 10(k) hearing on August 27 and 28, that grievance had been heard by an arbitrator but not decided. The scaffolding was fully erected by about June 10. It was dismantled in August approximately a week before the 10(k) hearing.

B. The Work in Dispute

The notice of hearing defines the disputed work as "the erecting and dismantling of platforms and scaffolding at the SkyBridge located at 1 North Halsted, Chicago, Illinois."

C. Contentions of the Parties

The Employer and the Laborers contend that there is reasonable cause to believe that the Carpenters have used proscribed means to enforce their claim to the work in dispute based on the statements of the Carpenters' steward, Meredith, to employee Malczewski and the statements of the Carpenters' business agent, Ryan, to Prime's vice president, Nitty. The Employer also claims that the Carpenters' grievance seeking to have a Carpenters' steward assigned to the project was an additional proscribed means of forcing Prime to reassign the disputed work. Further, the Employer and the Laborers argue that the Carpenters' statements as well as their grievance establish competing claims to the disputed work between the Carpenters and the Laborers. Finally, the Employer and the Laborers maintain that the disputed work should be awarded to employees represented by the Laborers on the basis of the factors of collective-bargaining agreements, Employer preference, current assignment, past practice, area and industry practice, relative skills, and economy and efficiency of operations.

The Carpenters move to quash the notice of hearing in this case, contending that there is not reasonable cause to believe that Section 8(b)(4)(D) has been violated. The Carpenters claim that the statements by Meredith to Malczewski did not constitute coercion or a threat to picket. The Carpenters also argue that they never made a claim to the disputed work, but merely sought to have a Carpenters' steward assigned to the project. Further, the Carpenters contend that Prime is biased in favor of the Laborers, at fault for entering into conflicting agreements with both Unions, and should not be allowed to use the Section 10(k) procedure to escape its obligations under the Carpenters' contract. Finally, the Carpenters argue that the work should be awarded to individuals it represents on the basis of the factors of relative skills and area and industry practice.

D. Applicability of the Statute

It is well settled that the standard in a 10(k) proceeding is whether there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This standard requires finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim to the work in dispute, and that there are competing claims to the disputed work among rival groups of employees. In addition, Section 10(k) requires that no method of voluntary adjustment of the dispute has been agreed on by all the parties. These three prerequisites have been met in this case.[6]

First, under Section 8(b)(4), it is a proscribed means of enforcing a claim to disputed work for a union "(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment . . . to perform any services." "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *Electrical Workers Local 501 v. NLRB*, 341 U.S. 694, 701–702 (1951). The provision thus proscribes statements that "would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer." *Los Angeles Building Trades Council* (*Sierra South Development)*, 215 NLRB 288, 290 (1974).

[4] Ryan denied making this statement.

[5] On other Prime projects in the Chicago area in which employees represented by the Laborers performed the scaffolding work, the Carpenters had similarly claimed that Prime was required to hire a Carpenters' steward.

[6] Consequently, we deny the Carpenters' motion to quash the notice of hearing.

Meredith's statements to Malczewski that the Carpenters' business agent said that the laborers had to stop working "would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer."[7] Id. Therefore, we find that Meredith's statements establish reasonable cause to believe that the Carpenters used the means proscribed by Subsection 8(b)(4)(i).[8]

We also find that there is reasonable cause to believe that Meredith's statement that Prime's employees had to stop working had the proscribed object of enforcing a claim to the disputed work. Meredith made this statement immediately after checking with his business agent about how to respond to the performance of the scaffolding work by Laborers-represented employees. Meredith also said to Malczewski that normally some Carpenters-represented employees perform the scaffolding work. Similarly, Ryan, the Carpenters' business agent, stated to Prime's vice president, Nitty, that Prime's employees were doing the work of Carpenters-represented individuals.[9]

Second, we find that the above claim of the Carpenters competed with the claim of the Laborers. The Laborers-represented employees asserted a claim to the disputed work by performing it since the project's inception.[10] See *Longshoremen ILWU Local 14 (Sierra Pacific Industries*), 314 NLRB 834, 836 (1994), affd. 85 F.3d 646, 652 (D.C. Cir. 1996) (citing *Operating Engineers Local 926 (Georgia World)*, 254 NLRB 994, 996 (1981)).

Third, the parties have stipulated, and we find, that there is no agreed-on method of voluntary adjustment of the work dispute that would bind all the parties. Accordingly, we conclude that we may appropriately determine the merits of this dispute.

[7] We find, and the Carpenters do not dispute, that Meredith is an agent of the Carpenters. See fn. 2, above.

[8] We need not decide whether other record evidence establishes reasonable cause to believe that the Carpenters used additional proscribed means to enforce a claim to the disputed work.

[9] Although Ryan denied making the statement attributed to him, the Board may consider contradicted testimony in finding reasonable cause. See *Operating Engineers Local 12 (Winegardner Masonry)*, 331 NLRB 1669, 1671 (2000); *Carpenters Local 1485 (C.J. Reinke & Sons)*, 254 NLRB 1091, 1093 (1981).

[10] The Carpenters argued at the hearing, but not in their brief to the Board, that competing claims to the disputed work do not exist because the work has been completed. However, the completion of disputed work does not eliminate competing claims to it nor moot the dispute, unless the record evidence demonstrates that a similar dispute will not arise in the future. See *Iron Workers California District Council (Madison Industries)*, 307 NLRB 405, 407 fn. 5 (1992); *Electrical Workers Local 701 (Federal Street Construction)*, 306 NLRB 829, 830 (1992). Here, the record evidence fails to so demonstrate.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 579 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962); *Electrical Workers Local 1049 (Asplundh Construction)*, 318 NLRB 633, 634 (1995).

The following factors are relevant in determining this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute. Accordingly, we find that the factor of certifications does not favor an award of the disputed work to employees represented by either Union.

The Employer is party to collective-bargaining agreements with both the Carpenters and the Laborers. Prime has entered into a letter agreement with the Carpenters, which is dated 1992 and is still in effect. It provides:

> EMPLOYER recognizes the UNION as the sole and exclusive bargaining agent for and on behalf of the Employees of the EMPLOYER coming within the territorial and occupational jurisdiction of the UNION.

That letter agreement also binds Prime to successor collective-bargaining agreements between area contractors and the Carpenters unless Prime gives written notice of its intent to terminate or amend any such agreement. The most recent successor agreement, which Prime has not given written notice to terminate or amend, is dated June 1, 2001. It defines the Carpenters' unit work and job titles in considerable detail, but does not mention scaffolding.

Prime has had collective-bargaining agreements with the Laborers since the early 1980s. More recently, in 2001, Prime became a member of the Chicago Area Scaffolding Association (CASA), which negotiated an agreement with the Laborers specifically designed for scaffolding companies.[11] The agreement states that it

> shall cover all work performed in connection with the erection, maintenance and dismantling of scaffolding, which shall include but not be limited to: pedestrian canopies (including post and beam system, frame system, tube and clamp system, parapet wall, barricade wall, and splash wall, whether stationary or mobile); construction scaffolding (including frame scaffolds,

[11] CASA did not negotiate an agreement with the Carpenters.

tube and clamp scaffolds, quick-connect systems, suspended platforms, and swing stages); monorail systems; and shoring (including frames and beams, post shores, trusses, brace and putlog, screwjacks, flooring and forms).

The above provision more specifically encompasses the disputed work than does any provision of Prime's agreements with the Carpenters. Accordingly, we find that this factor favors awarding the work to employees represented by the Laborers. See, e.g., *Machinists (Brown & Williamson Tobacco)*, 242 NLRB 22, 24–25 (1979) (finding that this factor favored employees whose collective-bargaining agreement "more specifically pertains to the work in dispute").

2. Employer preference, current assignment, and past practice

The Employer assigned the disputed work to its employees who are represented by the Laborers and maintains a preference for that assignment. Further, the Employer's past practice has been to assign scaffolding work within the Chicago area, such as the SkyBridge project, to employees represented by the Laborers. Consequently, we find that these factors favor awarding the work to employees represented by the Laborers.

3. Area and industry practice

A vice president of Prime, as well as executives of two other scaffolding companies that are members of CASA, testified that Laborers-represented employees perform virtually all their scaffolding work on commercial construction projects in the Chicago area. The Carpenters introduced testimony of its district council vice president, its business agent, and its assistant director of apprentice training that Carpenters-represented individuals have erected and dismantled scaffolding in the Chicago area for other employers. As the evidence admitted by the hearing officer indicates that at least some employees represented by each Union perform scaffolding work in the Chicago area, we find that the factor of area practice does not favor awarding the work to employees represented by either Union.[12]

4. Relative skills

The Employer and the Laborers introduced evidence that Laborers-represented employees obtain training and experience in erecting and dismantling scaffolding through the Laborers' training programs. Likewise, the Carpenters introduced evidence that Carpenters-represented individuals obtain training and experience in erecting and dismantling scaffolding through the Carpenters' training programs. Accordingly, we find that this factor does not favor awarding the work to employees represented by either Union.

5. Economy and efficiency of operations

The evidence regarding this factor consisted primarily of testimony by a vice president of Prime, Eric Ringstad, that all its new hires, even if they are well qualified, are observed and taught Prime's specific communication and scaffolding techniques by a supervisor for a day or two on their first project. In the Chicago area, the Employer employs employees represented by the Laborers, and thus they receive that training. The evidence does not establish that the Employer employs, in the Chicago area, employees represented by the Carpenters. Therefore, if the disputed work were reassigned from the already-trained employees represented by the Laborers to employees represented by the Carpenters, the Employer would need to invest additional supervisory time training and observing the new hires. Accordingly, we find that this factor favors awarding the work to employees represented by the Laborers.[13]

CONCLUSION

After considering all the relevant factors, we conclude that Prime employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, Employer preference, current assignment, past practice, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by the Construction and General Laborers' District Council of Chicago and Vicinity, affiliated with the Laborers' International Union of North America, AFL–CIO, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

[12] The Carpenters offered into evidence decisions of the National Joint Construction Board, disbanded several years ago, finding that the erection and dismantling of scaffolding over 14-feet high should be performed by Carpenters-represented individuals. However, the hearing officer excluded that evidence as too old and not involving either Prime or the Laborers. We have examined the evidence, which is cumulative of other Carpenters' evidence pertaining to area practice, and have concluded that if the evidence were admitted, it would not affect our finding that this factor does not favor awarding the work to individuals represented by either Union. Thus, it is not necessary to decide whether the hearing officer properly excluded the evidence from the record.

Insufficient evidence was introduced with respect to industry practice to find that this factor favors awarding the disputed work to employees represented by either Union.

[13] Inasmuch as it is the Employer's practice to observe and train all new hires, whether represented by the Laborers or by the Carpenters, Member Walsh would find the evidence regarding the factor of economy and efficiency of operations to be insufficient to favor awarding the work to individuals represented by either Union.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Prime Scaffold, Inc., represented by the Construction and General Laborers' District Council of Chicago and Vicinity, affiliated with the Laborers' International Union of North America, AFL–CIO are entitled to perform the erecting and dismantling of platforms and scaffolding at the SkyBridge located at 1 North Halsted, Chicago, Illinois.

2. Chicago and Northeast Illinois District Council of Carpenters is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Prime Scaffold, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Chicago and Northeast Illinois District Council of Carpenters shall notify the Regional Director for Region 13 in writing whether it will refrain from forcing Prime Scaffold, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work to employees represented by it rather than to employees represented by the Construction and General Laborers' District Council of Chicago and Vicinity, affiliated with the Laborers' International Union of North America, AFL–CIO.